CHUGACH ALASKA CORP.

IBLA 96-254 Decided November 17, 1998

Motion for award of attorney fees and expenses, under the Equal Access to Justice Act, in connection with adjudication of Native historical place selection application AA-11064.

Motion for award of attorney fees and costs denied.

1. Alaska Native Claims Settlement Act: Conveyances: Cemetery Sites and Historical Places--Equal Access to Justice Act: Adversary Adjudication--Equal Access to Justice Act: Application

   Because neither statute nor due process requires that the Department's adjudication of a Native historical place selection application under section 14(h)(1) of the Alaska Native Claims Settlement Act include an opportunity for hearing, an application for attorney fees and costs relating to such adjudication is not a cognizable claim under the Equal Access to Justice Act.

APPEARANCES: Beth Phillips, Esq., and Christopher Stroebel, Esq., Anchorage, Alaska, for Chugach Alaska Corporation; Joseph D. Darnell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management and the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE KELLY

On March 22, 1996, the Chugach Alaska Corporation (Chugach) filed a Motion for Fees and Costs (Motion) seeking attorney fees and expenses in the total amount of $4,361.71, pursuant to section 203(a)(1) of the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. § 504 (1994), and its implementing regulations, in connection with its prosecution of an earlier appeal to the Board docketed as IBLA 96-24.

Chugach originally appealed from a September 1, 1995, Decision of the Alaska State Office, Bureau of Land Management (BLM), which had rejected its Native historical place selection application AA-11064 for the Xatadulselye Village Complex, filed pursuant to section 14(h)(1) of

the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. § 1613(h)(1) (1994), and its implementing regulations. Before the Board addressed the merits of the appeal, BLM and the Bureau of Indian Affairs (BIA) moved that we vacate the Decision appealed, and remand the case to BLM for further adjudication. The Board granted the motion by Order dated February 27, 1996. Chugach has filed a memorandum in support of its Motion; BLM and BIA have filed an opposition thereto.

[1] Section 203(a)(1) of the EAJA provides, in relevant part, that "[a Federal] agency that conducts an adversary adjudication shall award, to a prevailing party * * *, fees and other expenses incurred by that party in connection with that proceeding." 5 U.S.C. § 504(a)(1) (1994) (emphasis added). The statute defines an adversary adjudication as "an adjudication under section 554 of [5 U.S.C.] in which the position of the United States is represented by counsel or otherwise." 5 U.S.C. § 504(b)(1)(C)(i) (1994). This section sets forth the procedures for agency hearings, and applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a) (1994) (emphasis added).

The Board has consistently held that the EAJA applies only in the case of proceedings which are required by statute to be determined on the record after an opportunity for an agency hearing. See Ray Rothbard, 143 IBLA 183, 184 (1998) and cases cited. Thus, under the Boards's previous holdings, the EAJA does not apply here because the applicable statute does not require a section 554 hearing. However, on August 20, 1998, the U.S. Court of Appeals for the Ninth Circuit, in Collord v. United States Department of the Interior, No. 96-36179, 1998 WL 512630 (9th Cir.), held that the EAJA applies not only when a statute requires a hearing, but also when the procedural due process requirements of the Fifth Amendment to the U.S. Constitution compel a hearing.

On appeal, Chugach recognizes that the EAJA applies whenever a section 554 hearing is required by statute, but argues that this includes those situations where procedural due process demands a hearing. Chugach maintains that a hearing is required when the Department is adjudicating its Native historical place selection application because Chugach has a property interest in the selected lands which is entitled to protection under the procedural due process requirements of the Fifth Amendment to the U.S. Constitution. Further, Chugach asserts that a hearing is necessary in order to satisfy ANCSA's intent and the Department's fiduciary obligation to Natives.

In Collord, the Court specifically held that a hearing was required by the procedural due process requirements of the Fifth Amendment to the U.S. Constitution in the case of a mining claim contest proceeding, where the Department is contesting the validity of a mining claim, since such a claim constitutes a property right which cannot be extinguished except following a hearing. Collord v. United States Department of the Interior, supra, at 3. It further held that a mining contest proceeding constituted

an adjudication "under section 554 of [5 U.S.C.]," within the meaning of the EAJA, since it was "governed by" section 554. Id. Thus, the Court concluded that this rendered the contest proceeding an adversary adjudication under the EAJA and entitled the claimants to pursue an award of attorney fees and other expenses under that statute.

We do not find the holding in Collord applicable here. Unlike the situation in Collord where a contest could result in the holder of a mining claim losing an existing possessory right to the claim, Chugach has no existing right but merely an unproven claim to the historical place applied for. Chugach's application is not entitled to a presumption of validity, and is subject to the discretion of the Secretary of the Interior. See Sealaska Corp., 127 IBLA 22, 29 (1993). Thus, Chugach's filing of an application does not give rise to the level of right or entitlement to a property interest that was found in Collord to be constitutionally protected.

Therefore, we conclude that Chugach's Motion does not constitute a cognizable claim under the EAJA, and must be denied. To the extent Chugach has raised arguments not specifically addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Chugach's Motion is denied.

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John H. Kelly
Administrative Judge

I concur:

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James P. Terry
Administrative Judge